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February 24, 2010

### **BY E-FILING**

Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

**ENTERED**  
Office of Proceedings

**FEB 24 2010**

Part of  
Public Record

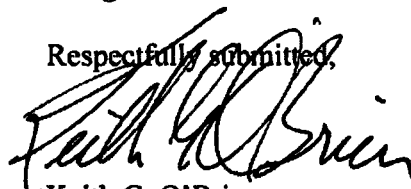
Re: *Massachusetts Department of Transportation – Acquisition Exemption –  
Certain Assets of CSX Transportation, Inc.*  
STB Finance Docket No. 35312

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding are the Reply Comments of the Massachusetts Department of Transportation in Support of its Motion to Dismiss ("Reply Comments").

If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7852 or by email: kobrien@bakerandmiller.com.

Respectfully submitted,



Keith G. O'Brien  
Attorney for Massachusetts  
Department of Transportation

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35312

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MASSACHUSETTS DEPARTMENT OF TRANSPORTATION  
– ACQUISITION EXEMPTION –  
CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

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REPLY COMMENTS IN SUPPORT OF MOTION TO DISMISS

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Attorneys for Massachusetts  
Department of Transportation

February 24, 2010

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35312

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MASSACHUSETTS DEPARTMENT OF TRANSPORTATION  
– ACQUISITION EXEMPTION –  
CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

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REPLY COMMENTS IN SUPPORT OF MOTION TO DISMISS

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The Massachusetts Department of Transportation (“MassDOT”) hereby responds to the Comments of the Brotherhood of Railroad Signalmen and Brotherhood of Maintenance of Way Employees Division/IBT (“BRS/BMWE”) filed on February 3, 2010, and Comments of the American Train Dispatchers Association (“ATDA”) filed separately on February 3, 2010, in response to MassDOT’s Notice of Exemption (“Notice”) and related Motion to Dismiss (“Motion”) in this proceeding. MassDOT maintains that it has followed in the footsteps of well established precedent as the basis for urging that its Notice of Exemption should be dismissed for lack of jurisdiction.

**BACKGROUND**

MassDOT has proposed to acquire from CSX Transportation, Inc. (“CSXT”) certain real estate and track and materials described in great detail in the Notice and Motion, and collectively referred to in this proceeding as the “Railroad Assets.” Although MassDOT proposes to acquire the Railroad Assets, CSXT is to retain a permanent and exclusive freight easement assuring that CSXT can continue to provide common carrier rail freight service to shippers on the Railroad

Assets. The Railroad Assets are to be acquired in two stages. At the First Closing<sup>1</sup> MassDOT will acquire the assets comprising the Grand Junction Branch, the Boston Terminal Running Track, and the South Coast Assets.<sup>2</sup> At the Second Closing, MassDOT proposes to acquire the assets comprising the BML-East and BML-West assets.<sup>3</sup> At the time of the First Closing, CSXT will simultaneously convey to Massachusetts Coastal Railroad, LLC ("Mass Coastal") CSXT's retained common carrier permanent and exclusive freight easement over the South Coast Assets pursuant to a Purchase and Sale Agreement of Permanent Freight Easement ("PSA").<sup>4</sup>

In the proposed transaction, the Commonwealth is committed to making a massive investment in the interest of expanding needed commuter rail service by facilitating the shared use of rail assets while assuring the continuation of existing freight rail service over the involved rail assets. It is very important to the involved parties that the First Closing occurs on or before May 14, 2010, and that the Second Closing, which is scheduled to take place later, is not impeded. As emphasized in the Motion to Dismiss, failure to consummate the First Closing at the specified deadline could seriously complicate execution of the transaction, and would undercut the Commonwealth's transportation infrastructure planning and funding initiatives, including a rail infrastructure project in New Bedford that will be funded in part by an award under the Transportation Investment Generating Economic Recovery ("TIGER") Grant Program.

As the Board is no doubt aware the use of TIGER funds is contingent upon prompt completion

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<sup>1</sup> All capitalized terms employed in this filing are used as they had been in the Notice and the Motion.

<sup>2</sup> See Notice at 8-9.

<sup>3</sup> Id.

<sup>4</sup> In addition to the PSA, the parties will also accomplish the following additional steps as preconditions to the First Closing: (1) CSXT and Mass Coastal will execute an interchange agreement governing the exchange of freight traffic between CSXT and Mass Coastal; and (2) MBTA and Mass Coastal will execute an operating agreement governing Mass Coastal's liability and maintenance responsibilities relating to operations over the South Coast Assets.

of such TIGER-funded projects in accordance with a statutorily-prescribed deadline. For these reasons, MassDOT urges the Board to adhere to its commitments in its prior order establishing a schedule in this proceeding, so that MassDOT and the other involved parties to this transaction can move forward in delivering the many benefits to flow from the proposed asset sale.

The proposed rail asset transaction is strongly supported by the Massachusetts Congressional Delegation and the Patrick-Murray Administration, all of whom emphasize that the transaction fulfills the Commonwealth's goals to expand commuter rail service, and urge expeditious Board action toward a finding that the transaction does not require exercise of the Board's regulatory authority, because it will not involve the transfer of CSXT's common carrier rights and obligations.

#### STATEMENT

BRS/BMWE and ATDA each focuses its respective comments in this proceeding to opposing the Motion, not the Notice. But as should be abundantly clear to all involved, in filing the Motion, MassDOT has relied in good faith on the long-standing and frequently employed agency precedent applying the so-called "State of Maine" construct. In applying this State of Maine construct, the Board consistently has found that a state or public entity may acquire railroad-owned track and underlying right-of-way for public purposes without becoming a rail common carrier (and without incurring the various obligations attendant upon assuming the status of a rail common carrier), provided that the selling railroad specifically reserves for itself a permanent and exclusive legal right to continue to provide rail freight common carrier service over the track assets in question.

As indicated above, State of Maine and its progeny factored heavily in the negotiation of terms of the proposed transaction, which has been designed to foster expanded and enhanced

commuter rail service through shared use of the involved rail assets. In striking a critical balance in the sometimes competing interests of freight and passenger transportation, MassDOT has agreed that CSXT and its successors will retain sufficient, permanent legal rights via easement to provide continued freight service. In terms of the substance of the property interest to be retained by CSXT, this agency and its predecessor have recognized that a substantial portion of the nation's right-of-way exists solely on the basis of rail easements.<sup>5</sup> Reaffirmation here of the State of Maine construct and its application to the proposed transaction will permit MassDOT to proceed apace with its plans to facilitate the expansion of commuter service with confidence that it will not assume unwanted and unneeded primary or contingency responsibility obligations for rail freight service that clearly is intended to remain with CSXT and its successors.

The issues raised by BRS/BMWE and ADTA have been the subject of extensive attention and briefings in recent proceedings including the response filed by CSXT in this proceeding with which MassDOT agrees in principle. Suffice it to state here that MassDOT relied in good faith on the extensive State of Maine line of cases in arriving at the specific terms of this transaction which is designed to greatly-benefit the Commonwealth. In relying on this extensive line of State of Maine-style cases (many of which are cited to in the Motion), MassDOT has relinquished the right to control or to interfere with the continued provision of freight common carrier service over the assets it proposes to purchase.

The Massachusetts Bay Transportation Authority ("MBTA"), a public authority of the Commonwealth of Massachusetts, is a non-carrier<sup>6</sup> that owns and has rights over certain lines in the Commonwealth and has responsibility for the provision of commuter rail service over those

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<sup>5</sup> See, e.g., Boston and Maine Corporation – Exemption- Discontinuance of Service in Essex County, MA, ICC Docket No. AB-32 (Sub-No. 37x), 1988 ICC Lexis 194\* 12 (June 20, 1988).

<sup>6</sup> See, Boston and Maine Corporation – Exemption, (*supra*).

lines. The Massachusetts Bay Commuter Railroad (“MBCR”), a private entity, currently provides commuter rail services over these lines including operation of trains and maintenance of track and equipment pursuant to an operating agreement with MBTA. MBCR is subject to the rail safety laws administered by the Federal Railroad Administration as well as laws relating to collective bargaining and other employee matters<sup>7</sup>. MassDOT anticipates that the proposed expansion of commuter service over the lines to be acquired will be provided by a rail carrier pursuant to an agreement with the MBTA.<sup>8</sup> This arrangement should provide reassurance that safety and other interests of labor will continue to be fully protected under the applicable statutes when commuter rail service is expanded pursuant to the proposed transaction.

MassDOT and all of the parties involved in developing the proposed transaction worked assiduously in crafting its terms to be consistent with previous transactions which have been found not to require advance Board authority. Specifically the parties have endeavored to ensure that no aspect of the proposed transaction will inhibit or deter CSXT or any successor from providing fully responsive rail freight service to shippers served by the involved lines. Based on those conscientious, good faith efforts, MassDOT submits that the proposed transaction – which is clearly in the public interest – should not require the Board’s advance authority.

ADTA argues, in the alternative, that some of the terms and conditions in the proposed transaction do not fit within the boundaries of prior agency decisions. ATDA’s argument suggests that, assuming the State of Maine construct applies, the agency should nevertheless find under the specific facts here that the proposed transaction is subject to the Board’s advance approval regulations. As the record in this proceeding demonstrates, MassDOT went to

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<sup>7</sup> See, Massachusetts Bay Commuter Railroad Company, LLC – Petition for Declaratory Order, STB Finance Docket No. 34332 (STB served June 5, 2003).

<sup>8</sup> See Boston and Maine Corporation – Exemption – Discontinuance of Service in Essex County, MA (supra).

considerable effort and expense in developing the terms of this transaction specifically to ensure that they are consistent with long-standing precedent, and so that MassDOT would not be saddled with unwanted freight service obligations. In so doing, MassDOT has structured the subject transaction so that MassDOT and MBTA cannot, in light of the reserved freight service easements, unduly restrict the provision of freight common carrier service over the Railroad Assets. Accordingly, the transaction, as structured here, is in keeping with and is modeled after extensive precedent (much of which is cited to in the Motion), and does not require advance Board approval. In other, similar proceedings the Board has not hesitated, when necessary, to seek clarification from proponents when it was uncertain about any aspect of a transaction, and the agency has, in such cases, typically invited the proponent to address the issue more thoroughly. Should the Board request clarification of any terms of this transaction, MassDOT will promptly respond.

### **CONCLUSION**

MassDOT and CSXT have agreed upon a mutually advantageous transaction that will deliver substantial benefits for Commonwealth commuters and businesses through expanded passenger service, but that will also assure the continuation of responsive rail freight service by CSXT and its successors. The transaction was carefully crafted to assure that neither MassDOT nor any other subdivision of the Commonwealth would be perceived as undertaking any unwanted and unneeded obligation for rail freight service over the involved lines that will continue to be the responsibility of CSXT and its successors.



For all the above reasons MassDOT respectfully urges the STB act expeditiously to find that the proposed transaction is not subject to the Board's jurisdiction and to grant its Motion to Dismiss the Notice of Exemption in this proceeding.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Keith G. O'Brien", written over a horizontal line.

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Attorneys for Massachusetts  
Department of Transportation

DATED: February 24, 2010

### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing Reply Comments of the Massachusetts Department of Transportation in Support of Motion to Dismiss by mailing copies of the same via prepaid first class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 24th day of February, 2010.

  
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Keith G. O'Brien